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CHEMICAL MAN

During man's first days on earth as a social animal, he must have come across the plants and roots in nature that gave relief from physical suffering. This would have happened during his search for food resources in his immediate environment. Over many years, the knowledge of different natural remedies would accumulate and it is in these days before man was literate that we see the beginning of drug use.

Apart from the drugs offering relief from physical pain, early man must also have discovered the drugs of a dream nature. Plants that when eaten would provide a release from his immediate surroundings and allow periods of euphoria, hallucination, or intoxication. We tend to think that boredom is a product of modern man but it is more than likely that primitive man suffered longer and more intense periods of boredom than his modern counterpart and the use of the substances of "release" would be widespread.

The development since the early days of these two types of drugs follows two separate paths, meeting only in 1952 with the development of the tranquillisers.

Taking the physical drugs first, we see in primitive tribes the emergence of the witch doctor. He would have his power due to the fact that he could catalogue in his mind the plants around the tribe better than anyone else. He could dispense relief (sometimes) by using this knowledge and was thus thought to have magic powers. This magical connection between drugs and man remained with him until the late Middle Ages.

Leaping forward to the days of Greek and Roman societies, we see the emergence of the doctor figure. The man living within a strict code of professional behaviour and responsible for the health and well-being of the rest of society. He was still, however, confined by the natural environment in his search for useful drugs. He had the knowledge handed down over the preceding centuries, which also contained much folklore and often useless material, but with the birth of scientific man we see the slow increase in the number of natural products available.

By the Middle ages, the idea was well established that it was the *essence* of the plant that man needed to extract and not just ingest the whole plant. This would come about with the slow realisation that some plants had to be used only at a certain time in their life cycle and thus it was obvious that something was being produced in the plant that gave the relief sought. Man was limited in his ability to take this idea further and indeed this isolation of the essence had to wait many centuries.

By the time of the Renaissance, two figures had emerged in the medical field. Together with the doctor, responsible for the treatment of sickness, we see the rise of the apothecary or alchemist. Here was a man more interested in the search for drug preparations than in their actual use. With this specialisation of interest we see the number of natural preparations increasing but at the same time the inclusion of much that was useless. Also, the form of the preparation still left much to be desired. When one looks back at the early pharmacopoeia it becomes obvious that the patient had to be remarkably fit to take some of the preparations. However, by the end of the seventeenth century the pharmacist had emerged as a specialist in his own right.

Man had to wait until after the industrial revolution before he attained sufficient scientific

sophistication to extract the pure chemicals from the plant material used in medicine. Only in the late 1800s did we see the appearance of aspirin, benzedrine, and the isolation of pure morphine, iodine, and codeine. As late as 1921 it was estimated that 60 percent of all prescriptions written used only three basic drugs—aspirin, phenacetin and caffeine. Although chemists made a major drive in the field of chemotherapy during the early part of the twentieth century, it was only from 1950 onwards that the exponential rise in the number of drugs occurred following the increased interest in synthetic drugs. No longer is man dependent upon the natural environment directly for his drugs but now tailor-makes chemicals for a specific medical purpose.

Turning now to the development of the "dream" drugs, it is an interesting fact that all societies seem to have developed with at least one drug of intoxication. Early man must have discovered the different mushrooms and other plant life that yielded drugs of the hallucinatory or euphoric type. The history of these drugs shows, however, that their control within a society was governed by different factors. This control came more from socio-religious guidelines and in the main became an *accepted* part of life more than the drugs of a physical nature. Many of them were associated with religious rites and would be used by the medicine man or priest figure only on certain high days and holidays. Slowly over the years each society has grown with its national poison and today different cultures approach each other's dream drugs with suspicion and much emotional bias.

The drug in question for Western society is of course ethyl alcohol. We know that man was using this before he was literate. The "Blue Monument" in the Louvre, the oldest monument to human culture, mentions beer as a drink offering. Throughout Western man's development the drug has been widely used with little apparent need for control. However, of more recent times the misuse of the drug has led to quite strict control by legislation. Anyone familiar with the works of Dickens will have a clear picture of what poor social conditions can do to a mass of people. Following such times it was popular to blame the "demon drink". We are now slowly realising that it is the "demon conditions" (both real and as perceived by misusers) that cause the major misuse of a drug in society. This is further borne out by the fact that in New Zealand in 1911, we came within 0.5 percent of prohibiting alcohol completely following the "wet-dry" vote. This was at a time of economic depression and the highest incidence of drunkenness the country has known. Today we can talk of opening the public houses until 11 or 12 o'clock at night.

We would be fooling ourselves, though, if we think we have solved the problem of the use of alcohol in society. We have in New Zealand an estimated 30,000 alcoholics. But at last we are facing up to the responsibility of treatment for such a condition and the idea of alcoholism being a sign of moral degeneracy is being replaced by the recognition of it as a disease. We must realise that we know so little about addiction but what we do know points to the areas of personality defect and not the inherent properties of drugs themselves. Thus we must accept that we will never produce a society without drug addicts and, in the case of our particular society, without alcoholics. We must achieve a situation where the drug is used and controlled in the best possible way, while at the same time the people who cannot handle it are given suitable treatment and guidance.

Turning now to a drug of another culture—marijuana. Many years ago, Arabs could only drink alcohol on pain of death because the Koran was very strict on this point. Yet they had a drug of an intoxicating nature—marijuana, obtained from the cannabis plant. Today we can use marijuana on pain of probation, fine, or, exceptionally, up to three months' imprisonment yet we can drink ourselves to death. A phenomenon which is by no means uncommon.

Marijuana was known to the Chinese about 3,000 years ago. It entered Western civilisation in the early nineteenth century when Beaudelaire and the Bohemians of Paris met to discuss the effects of the drug. Beaudelaire's book *Paradis Artificiels* describes fully the effect of the drug. Even today much of Beaudelaire's description still holds, though more is known of the clinical effects of short- and medium-term use, and research is actively proceeding with some disturbing pointers yet to be proven.

The question always asked when marijuana is discussed is "What are the harmful effects of the drug?". Yet is this a relevant question when determining whether or not society should have access to it? There are two main reasons why I think not. One is the fact that if you give a scientist any substance he will find it "harmful" to some degree: if you drink too much water you will drown. Secondly, we are too inconsistent on this point of the possible harm caused by drugs. Because if harm to an individual is of paramount importance, then we should have

acted more vigorously upon cigarette smoking of tobacco at least three years ago.

The question of living or not living with new drugs from another culture will not be answered for us solely by the scientists. It must be seen largely as a social problem and one demanding our fullest attention. Unfortunately, up to now we have not given this problem our *fullest* attention. We have been content to sit back and allow one institution of our society to try and shoulder too much of the burden, viz, the law. This is not to deny that the law has a proper role, for some controls are necessary and inevitable.

These two streams of drug development—the mental and physical—came together only in 1952. Work on the rauwolfia alkaloids produced the major tranquillisers. Subsequent work in the field expanded the availability of such drugs and for the first time the doctor had in his armoury a weapon to fight "depression". I think it is now evident that no one was prepared for the enthusiasm with which these new drugs were received. Apart from their use in the treatment of severe mental disorders, the general practitioners in most Western countries now dispense their tranquillisers by the millions of doses per year. In New Zealand during 1969 the Department of Health statistics show that 69 million doses of two minor tranquillisers were dispensed.

It is here that we come to what I maintain is our real drug problem. Not the *use* of such drugs by a large section of society but the inability to face up to the fact that the age of chemical man has dawned. We have a bright technological future with chemicals but only if we resolve in our minds the best way to overcome the problems posed by a small percentage of people who cannot handle the use of drugs. The time has come to see the problem of drugs in truer perspective and to ask more persistently the basic question "Why do people take drugs?" Why do some people become addicted—or mastered by drugs—and a majority escape such servitude?

What we must work towards is a system in which *all* problems posed by the use of drugs are handled by the medical and social welfare organisations. A system which treats all drugs in an equitable way. This is not a call for a permissive attitude to drugs but rather a call for a better system of real control over drug taking of all forms.

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SUMMARY OF RECENT LAW

AGENCY—CONTRACT

"Contract" made with non-existent company—Persons purporting to act as officers not liable on contract for goods delivered. Prior to incorporation of Endeavour Suppliers Ltd, the second defendant, on 15 May 1972, the plaintiff had purported to appoint that company as its Auckland agent for the sale of yoghurt. The plaintiff claimed a balance owing for supplies from March to November 1972 from the first defendants who had purported to act as officers of the second defendant prior to its incorporation. The first defendants claimed that neither of them was aware that the company had not been incorporated until May as all the documents had been completed by 18 January 1972. The second defendant had gone into liquidation on 14 March 1973 after the writ had been issued, but no application was made pursuant to s 226 of the Companies Act 1955 to continue the action against the company. *Held,* 1 The first defendants were not liable on any contract with the plaintiff because they did not contract as agents or otherwise. The "contract" was made by a non-existent company. (*Black v Smallwood* (1966) 117 CLR 52, applied; *Kelner v Baxter* (1866) LR 2 CP 174, distinguished.) 2 The first defendants were not liable for breach of warranty of authority, the case being founded in contract and not in damages for breach of warranty. *Hawke's Bay Milk Corporation Ltd v Watson and Others* (Supreme Court, Napier. 13, 28 June 1973. Wild CJ).

HUSBAND AND WIFE—DOMESTIC PROCEEDINGS

Maintenance order—After separation wife had child by another man; such child being an invalid wife could not work—Although wrongful conduct is not a bar to maintenance if otherwise justifiable, wrongful conduct is not the qualifying factor for the making of an order—Domestic Proceedings Act 1968, ss 25, 27 and 28 (1). The parties were separated when in 1966 the wife gave birth to a child whose father was not the husband. The wife had brought affiliation proceedings but the case had been dismissed. The child suffered from a brain disorder for which he had had 18 operations, and in the present proceedings the wife sought and had obtained in the Magistrate's Court a maintenance order for herself against the husband solely upon the basis that she could not work as she had to remain at home to look after the child. On appeal against the making of that order, *Held,* 1 In order to found jurisdiction the Court must find as a fact pursuant to s 25 of the Domestic Proceedings Act 1968 that the wife is not receiving or is not likely to receive proper mainten-

ance. 2 If jurisdiction is established the making of a maintenance order is not mandatory and the Court must have regard to the provisions of s 27, as to whether it will make an order. 3 The establishment of any of the matters referred to in s 28 (1) does not mean that a maintenance order must necessarily follow. 4 Section 28 (1) does not make the wrongful conduct of a wife a qualifying factor for the making of an order, but merely provides that if an order would otherwise be made such wrongful conduct shall not disqualify the wife from having an order made in her favour. 5 The phrase "other circumstances" in s 28 (1) is not limited to circumstances within the marriage, and circumstances created by the wrongful conduct of the wife may in some cases be "other circumstances" within s 28 (1). 6 It is one thing not to withhold a maintenance order because of misconduct of the wife, but it is another thing to make that conduct the "raison d'etre" of the order. The appeal was allowed. *O'Sullivan v O'Sullivan* (Supreme Court, Dunedin. 14 May; 10 July 1973. McMullin J).

PRACTICE—INTERROGATORIES

Real estate agent claiming commission refused leave to deliver interrogatories as answers might constitute an appointment in writing of agent. The plaintiff, a real estate agent, sued for commission on the sale of the defendant's farm. As a defence the defendant pleaded s 79 (b) of the Real Estate Agents Act 1963, viz, "No person shall be entitled to sue for . . . any commission . . . in respect of any service . . . performed by him as a real estate agent, unless . . . (b) His appointment to act as agent or perform that service . . . is in writing signed either before or after the performance of that service . . ." The plaintiff sought leave to deliver interrogatories. *Held,* Since the answers to the proposed interrogatories by the defendant might constitute an appointment in writing within the terms of s 79 (b) of the Real Estate Agents Act 1963, leave was refused. (*Simon v Gardner* [1942] GLR 338; and *Lovell v Lovell* [1970] 3 All ER 721, applied.) *Midland Real Estate Ltd v Smith* (Supreme Court, Hamilton. 10 July 1973. Wild CJ).

PUBLIC WORKS—COMPENSATION

Refusal to approve subdivision—Three years later subdivision permitted—Claim for compensation for "suffering any damage from the exercise of any of the powers hereby given"—Claim not maintainable—Municipal Corporations Act 1954, s 166. In May 1968 the claimant submitted a scheme plan to the respondent for subdivision of its land for the purposes of a residential subdivision which was in accordance with the zoning of the land. The respondent refused to approve the subdivision because it had decided that part of that area would be suitable for a municipal tip. There were a series of legal battles against the placing of a tip in that area and finally, on 14 October 1971, the applicant obtained consent to its subdivision after the battle for the tip had been lost. The claimant then pursuant to s 166 of the Municipal Corporations Act 1954 claimed compensation for loss of interest on the capital involved and rates and insurance, being losses it had sustained between 1968 and October 1971 when the land lay idle because of the refusal to consent to the scheme of subdivision. The questions raised were whether the claim was barred by limitation of time and whether the claim was validly brought under s 166. *Held,* 1 Time starts to run under s 45 of the Public Works Act 1928 as regards a claim for compensation for "suffering any damage from the exercise of any of the powers hereby given" under s 166 of the Municipal Corporations Act 1954 not from the date of the refusal under s 351A of the Municipal Corporations Act but the date when the refusal ended and the permit was granted. (*Wells v Newmarket Borough Council* [1932] NZLR 50; [1931] GLR 590, applied.) 2 The expression "any of the powers hereby given" in s 166 of the Municipal Corporations Act 1954 is referable only to the doing of public works. (*Fitzgerald v Kelburne & Karori Tramway Co Ltd* (1901) 20 NZLR 406; *O'Brien v Chapman* (1910) 29 NZLR 1053; *Irvine & Co Ltd v Dunedin City* [1939] NZLR 741; *Strongman Electric Supply Co Ltd v Thames Valley EPB* [1964] NZLR 592; and *Ricket v Directors of the Metropolitan Ry Co* (1867) LR 2 HL 175, referred to.) 3 The phrase "any damage" in s 166 applies to compensation for loss caused by an interference with an interest in land but *not* for damage to trade or business nor for damage resulting in personal loss or inconvenience. (*Barber v Manawatu-Oroua EPB* [1954] NZLR 391, 395; *Ministry of Works v Green & McCahill (Contractors) Ltd* [1965] NZLR 580, 588, 590, applied.) *Superior Lands Ltd v Wellington City Corporation* (Supreme Court (Administrative Division), Welllington. 14, 27 June 1973. Beattie J).

PUBLIC WORKS—TAKING OF LAND

Taking of land by proclamation and compensation paid therefor—Further proclamation revoking first proclamation ultra vires—Public Works Act 1928, s 27 (1)—Real Property—Land Transfer Act—Claim by owner on second proclamation revoking first proclamation and retaking land—Section 62 of the Land Transfer Act 1952 confers no rights other than indefeasibility of title—Land Transfer Act 1952, s 62. The land of the claimant was taken by proclamation made on 31 August 1960 pursuant to the Public Works Act 1928 and the claimant was paid compensation therefor. At the time of taking the land was subject to a building line restriction and a right of way over part thereof. These encumbrances were not mentioned in the proclamation and were accordingly discharged. This was not intended and on 9 March 1970 a further proclamation was made revoking the earlier one and retaking the land subject to the encumbrances. The proclamation was registered in the Land Transfer Office. The claimant claimed compensation for the taking of the land by the second proclamation giving credit for the compensation paid in respect of the taking of the land under the first proclamation. *Held,* 1 The power to revoke a proclamation pursuant to s 27 (1) of the Public Works Act 1928 is expressly limited to the period after the proclamation has been made and before payment or award of compensation in respect of the land taken. Compensation having been paid prior to the second proclamation the latter was ultra vires and void. 2 Section 62 of the Land Transfer Act 1952 means that subject to the exceptions therein mentioned the register is conclusive as to the legal title to the estates and interest shown thereon, so that persons may deal with them with confidence notwithstanding any defect in the right of the registered proprietor to be so registered, but confers no rights other than "indefeasibility of title". (*Frazer v Walker* [1967] NZLR 1067; *Sutton v O'Kane* [1973] 2 NZLR 304; *Public Trustee v Registrar General of Land* (1899) 17 NZLR 577; and *Boyd v Mayor, etc, of Wellington* [1924] NZLR 1174, referred to.) 3 Notwithstanding registration the registered proprietor may be subject

to rights in personam which deprive him of any real beneficial enjoyment. (*Frazer v Walker* (supra) at pp 1078-9, applied.) 4 The earlier proclamation not having been revoked there was no revesting of the land in the claimant and no retaking thereof upon which to found a claim for compensation for the taking of land under s 42 (1) of the Public Works Act 1928. *Green & McCahill (Contractors) Ltd v Minister of Works* (Supreme Court (Administrative Division), Auckland. 26 June; 4 July 1973. Wilson J).

SALE OF LAND

Pending completion property destroyed by fire—Under contract terms risk remained with vendor—Purchaser selling to sub-purchaser—Vendor liable to reinstate re-selling—Equitable interests of purchaser and sub-purchaser. Real property—Land Transfer Act—Interests of vendor as registered proprietor and equitable interests of purchaser and sub-purchaser—Caveat lodged by sub-purchaser not maintainable—Registered proprietor not a party to sub-purchase—Land Transfer Act 1952, s 41. The respondent vendor entered into a contract for the sale of two properties to S P Ltd ("the purchaser"), which was fixed for completion on 24 November 1972. On 22 November 1972 S P Ltd executed an agreement to sell the properties to the applicant, the subpurchaser. On 23 November 1972 a fire destroyed the house on one of the properties. Under the terms of the vendor's contract with the purchaser the risk did not pass to the purchaser and the vendor was bound to reinstate. The purchaser demanded reinstatement and refused to complete at a lower price. Correspondence ensued between the vendor and purchaser in which both purported to make time the essence of the contract. Finally the vendor claimed the contract was at an end and sold the property to L. Both the purchaser and subpurchaser lodged caveats on the vendor's title. The District Land Registrar gave notice pursuant to s 145 of the Land Transfer Act 1952 that the caveats would lapse unless an application for an order to the contrary was made to the Supreme Court. The subpurchaser applied for an order that his caveat had not lapsed. *Held,* 1 Notwithstanding s 41 of the Land Transfer Act 1952 the purchaser under an agreement for sale obtains the status of an equitable owner so long as the Court will decree specific performance against the vendor as registered proprietor. (*Barry v Heider* (1914) 19 CLR 197, and *Orr v Smith* [1919] NZLR 818, referred to.) 2 The recognition of equitable interests in land under the Land Transfer Act 1952 is limited to those interests created by transactions to which the registered proprietor is a party. (*Tataurangi Tairuakena v Mua Carr* [1927] NZLR 688, referred to.) 3 The title of the vendor as registered proprietor was immune from any equity possessed by the subpurchaser because the vendor was not a party to the sub-agreement for sale; it would be otherwise if the purchaser had assigned the benefit of his contract with the vendor to the subpurchaser. 4 The subpurchaser had no interest which was capable of supporting a caveat. *Catchpole v Burke* (Supreme Court, Auckland. 16, 20 July 1973. Mahon J).

LEGAL LITERATURE

"Prisoner"—My Eighteen Months in Wi Tako" by "John Justin". Whitcombe & Tombs. 117 pp. $3.25.

The public at large has long been in need of a considered account at first hand of our penal system. This, unfortunately, is not it. Instead of the book one feels the anonymous author could and should have written, we have a disjointed collection of tales from within, in each of which the author is the hero. Periodically he takes time out to take sideswipes at both the penal and the judicial system, none of which can be taken seriously. For example, he decries a system of justice which can convict him on the word of children, and because he has been convicted by a jury he claims that the jury system "has no place in modern society. It is a dangerous anachronism." The rules of evidence must be rewritten—the police should be required "to prove (and I really mean prove) their case. Word against word is not sufficient, no matter who the parties concerned are, police or not." And once a person has been convicted (of crimes of a degree unspecified) he should not be given a finite term but should be incarcerated "until such time as he would be considered safe to return to the community". Work parole, he maintains, is an "enforced schizophrenia and deception" for it appears that the author was never prepared to admit to his workmates that he was on work parole; work parole saw "each other grow a little madder each day. . . . Very few could withstand the mental and emotional torture it caused". Prison rehabilitation programmes were "a good, honest attempt and the authorities undoubtedly meant well in introducing them, but I don't think that they have achieved much, if anything."

Yet against the background of a tirade directed at the system which tried and convicted him, and the penal system which did nothing to reform him, the claim is made in the preface that the author (presumably a pederast, he does not say) is a "rehabilitated prisoner". How this fortunate state of affairs came about is not explained—but it was certainly through no conscious effort on the part of the system. Of course. He was never guilty in the first place, was he!—JDP.

THE DUTY SOLICITOR

In the space of one year in Christchurch provision of a Duty Solicitor scheme in the Magistrate's Court (and in the Children's Court has had a considerable effect upon the existing criminal Legal Aid Scheme (see Offenders Legal Aid Act 1954 and Offenders Legal Aid Regulations 1972) and will have an even greater effect in the immediate future whether a new concept or system of criminal Legal Aid is instituted, the present system is amended, or it is simply left as it stands.

On 9 October 1972, with a great deal of hope and not too much forethought, provision for Duty Solicitors was injected into the Magistrate's Court at Christchurch. This system was a voluntary and unpaid scheme whereby a number of local solicitors (varying from 40 to 50) in total, had their names placed on a roster, a date was put against each name and each was in effect, instructed to be in the Court on that day and appear as Duty Solicitor.

The genesis for the system used is to be found in the Scottish scheme (see Guthrie Committee Report—Scottish Home Department "Legal Aid in Criminal Proceedings" 1960 cmnd 1015, 45) as modified in the Canadian Province of Ontario (see "Report of the Joint Committee on Legal Aid (Ontario)" 1965, 45-48) with some differences and, hopefully, improvements necessary for our local (and unpaid) situation.

The initial instructions to those appearing were kept as short and simple (and therefore as flexible) as possible. The principal functions of a Duty Solicitor were seen as being:

(1) assisting persons (both in and out of Court but at Court and whether in or out of custody) on matters of remands, adjournments and bail;

(2) advice as to legal aid (criminal) or representation if the person charged could afford such himself;

(3) advising if necssary on whether a particular charge should be pleaded to and on the plea to be entered; and

(4) acting for and speaking on behalf of some (in effect making a plea of mitigation), acting as it were as a sort of amicus curiae (this latter aspect is probably the most perplexing one and has been left still on a rather loose basis).

Ultimately it was left to the discretion of the individual counsel and the urgency and stress of the particular case—judging from recent observations it would seem that a greater number of pleas in mitigation are now being done on this basis than was so at the start. The need for such a scheme was seen as being to ensure proper representation for all having regard to such factors as:

(a) there was often a lack of proper advice before a person appeared in Court to answer a charge.

(b) the increasing numbers of and complexities in laws affecting each individual citizen.

(c) general public ignorance and/or misunderstanding of an individual's rights when charged in a criminal Court (and perhaps a greater effort is called for in education in that regard).

(d) the fact that those appearing in Court on charges are, usually, those least able through a variety of reasons, to look after and speak for themselves in the Courtroom context—there is often for them a quite formidable and frightening chasm between the dock and the Bench.

In both the other common law jurisdictions mentioned, the schemes appear to function well, although in each case the Duty Solicitors are being paid by the State and are in effect being paid to appear but not only deal with remands, adjournments, bail, legal aid and other ancillary matters, but also plead in mitigation on pleas of guilty. Their standing in such a context is clear—ours was and is still rather murky.

We chose to set up this system rather than, for example, try to press for a Duty Officer or Public Defender or some such similar scheme as (1) we saw the need for provision of assistance as immediate and those other modes were not immediately achievable; (2) in any event we were convinced that the best available and most desirable way of achieving proper representation for persons appearing on criminal charges was through this type of system. I note now that for very much the same reasons as ourselves (being principally the simplicity, the use of the solicitors' knowledge query, skill or at least, with some guile and the association of a solicitor with the traditional Defender's role as

opposed to a paid state servant in that role) the Inter-Departmental Committee appointed by Government to study, inter alia, this question came to the conclusion that a Duty Solicitor scheme was the best approach.

At this stage and after a year with really very few teething problems and some expansion to other Courts, I think it is suffice to say that the system has worked and is working well. As I understand the position, the New Zealand Law Society has basically adopted the scheme as operated in Christchurch as their suggestion for a national scheme covering such things as requests for remands and bail, adjournments, assessment of circumstances so that arrangements can be made for the defendant to be properly represented (whether on legal aid or otherwise) and making a plea in mitigation where it is "obviously desirable that the matter should be disposed of promptly and the only convenient way of doing this would be for the Duty Solicitor to appear." One major difference between our rather puny effort and a national scheme would be the question of pay. As I understand it that (to some people embarrassing) question how much and how often if one of the few hindrances (if not the only one) to the establishment of the scheme at present.

Having said all that the question remains what application has all this got to do with legal aid. The best way to give any answer to that, is to look at some figures:

MAGISTRATE'S COURT CHRISTCHURCH (FROM ANNUAL RETURNS)

Year	Total No of Charges	Children's Ct Charges	Magistrate's Court Charges	Traffic Offences	Criminal (?) (Will include charges of Miscellaneous type)
1964	21,732	988	20,744	—	—
1968	33,616	1,890	31,726	25,800 (including parking offences)	5,926
1970	32,380	2,410	29,980	20,055 (excluding most parking offences)	9,853
1971	32,225	2,134	30,091	22,316 (including speeding infringements)	7,775
1972	29,533	2,471	27,062	18,731 (excluding speeding infringements)	8,331

I might then turn to some other figures taken from Magistrate's Court records in Christchurch, namely those relating to applications for legal aid under the Offenders Legal Aid Act 1954.

(1) In the year 1964 there were a total of 47 applications for legal aid;

(2) For the three years 1964, 1965 and 1966 there were a total of 179 applications—of those only two were refused (one of those because in the meantime the applicant had been committed to Sunnyside Hospital);

(3) In 1968 there was something of an upswing in applications and there were 170 in all (cf 5,926 criminal charges laid).

(4) In 1969 there was approximately 250 applications in all.

(5) By 1971 there had been some considerable growth and the overall number was approximately 564 applications (remember there were some 7,775 criminal charges brought that year in the Court, although of course, some of these were not strictly criminal charges and no doubt there were not 7,775 different people involved; it has been known for one person to be charged even by our present day police with more than one offence).

(6) In 1972 there were some 850 applications approximately (as compared with 8,331 total criminal charges which was only a very slight overall increase on the previous year but the applications for legal aid grew at a far higher proportionate rate, viz, a rise of some 14 percent in numbers of charges; but a 50 percent or so rise in legal aid applications, remembering that the Duty Solicitor scheme started on 9 October 1972 and therefore, possibly, affected the last three months of that year.

(7) Now because our scheme was brought in part way through the year, I have taken out some other figures to try and give, perhaps, some valid picture of present trends:

(a) From October 1971 to October 1972 there were 714 applications for legal aid of which 27 were declined (note, too, that the new scale provided for in the Offenders Legal Aid Regulations 1972 came into effect in August 1972).

(b) For the year from 9 October 1972 to 24 September 1973, there have been 1,255 applications for legal aid of which 79 have been refused (compare that refusal number 79 with the total number that applied for legal aid in 1964—47).

(c) The figures for the current year do not quite cover the whole of a year, but it would seem that legal aid applications have almost doubled in one year whereas the total number of charges brought has certainly not doubled and have not risen, overall, a great deal. Although more people were refused legal aid, the ratio of successful legal aid applications will still be almost double.

It would be easy to then say, "Oh well, look what we've done for the profession, the Duty Solicitor scheme has in one year brought twice the amount of criminal work to all these (i) aspiring Court lawyers (ii) impoverished lawyers or (iii) idealists (and criminal legal aid lawyers invariably belong to one or the other or all of those types)—they should have either picked up a lot of experience, or a lot more (or realistically a *bit* more) money, or have lost a few of their ideals—by those standards, we surely have been successful." But the true measure is, of course, in the assistance given to those in trouble—not measuring in terms of numbers assisted (and they are considerable—something like 1,900) but in terms of those who, through inadequacies of many types, are unable to comprehend, cope with or make themselves heard and understood within our present laws and Courts, they have been assisted and eventually represented, their right to be defended and their right to audience having been properly allowed to them.

Too often before (and still even now because no such system can be perfect—and so still too often) such was not the case. At some time in the hopefully near future, we will have a paid Duty Solicitor scheme—payment presumably being on the basis not of the number of times he bobs up and down during the course of his morning on but on the basis of his actual attendance at Court, despite the number of individual attendances whilst he is there.

When this transpires, the Duty Solicitor field will then truly become part of a more comprehensive criminal legal aid system, as indeed it should be—it will be a component and essential part, not just as at present, a rather patchily fabricated spare part, shakey and unsure of tenure and standing.

Whether the birth of such a new scheme is immediate or not, it is not going to affect the present rising trend in the level of applications to the Court for legal aid which means that more solicitors will be required to make themselves available for these type of assignments and more solicitors will be required to administer the Duty Solicitor scheme.

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(a) This paper was prepared for a seminar on Legal Aid organised by the University of Canterbury.

JUDICIAL APPOINTMENTS IN NEW ZEALAND

Conflict is inevitable in virtually every community. In all but the smallest communities there are various advantages or rights jealously claimed as exclusive possessions by particular individuals, by groups of individuals, or by the community itself. Since the struggle for advantage is probably the greatest motivating force in the community there will be constant clashes as some parties attempt to extend their advantages at the expense of others.

Open conflict is contagious(*a*); thus primitive methods of resolving disputes—involving physical combat—threatened the peace of the whole community. Today the process of civilisation has yielded the judicial institution whereby, to a very large extent, disputes are channelled into a Courtroom. Inside the Courtroom the combative element is confined to, and reflected in the adversary nature of the proceedings.

The judiciary is recognised, in New Zealand and elsewhere, as the third branch of government(*b*). The Judges, no less than Members of Parliament, are institutionalised decision makers. Perhaps unlike Members of Parliament, the Judges are expected—in the language of

(*a*) For a discussion of this point, see E E Schattschneider, *The Semi-sovereign People* (New York, 1960), at pp 1-19.

(*b*) Throughout this paper (unless inconsistent with the context), "judiciary" refers to the Judges of the Supreme Court in New Zealand and does not include Stipendiary Magistrates.

Socrates—to "rule mind with mind". This strongly suggests that, viewed in the political context, the Judge is a most unusual creature: a philosopher-king in the democracy.

The citizens of the democracy seem to know but little of their philosopher-kings. To a majority of the populace, at least, the Judge is a vague and remote figure: an elderly man who wears a wig and sends criminals to prison. That this impression persists may be attributed to the fact that very few people come into direct contact with Judges. Nevertheless, the impression is not dispelled by the traditional judicial habits of reticence and, more important, sensitivity to implied criticism. Sir Thaddeus McCarthy, the President of the Court of Appeal, was recently reported to have said that:

> "Our institutions from top to bottom are under attack by restless youth and a dissatisfied intelligentsia—Royalty, the Church, have had their turn, and now the Courts are in the firing line."(*c*)

Statements such as this do violence to any attempt to better comprehend the judicial institution.

This paper is concerned with the "how" and "why" of judicial appointments in New Zealand. It is not intended to be an "attack" on the Judges or, by implication, on the Courts. The approach which has commended itself to the writer is the following:

> "In general our judges are held in high respect by both public and lawyers. But it would be wrong to suppose that all judges are universally respected or that, because most of them are, the judiciary as an institution needs no improvement."(*d*)

The topic of judicial appointment is of special significance. It is at the time of his appointment and no later that the qualities of the Judge must be assessed. In addition, it is the process of appointment which elevates a mere citizen to the status of philosopher-king.

Before embarking upon the discussion of judicial appointments themselves, it is essential that some consideration be given to the function of Judges.

The judicial function

In New Zealand and elsewhere the aims of the law are understood to be the maintenance of order (to the immediate benefit of the public) and the doing of justice (to the immediate benefit of the individual). These aims are something less than entirely compatible; they can and perhaps must conflict with each other. Nevertheless, the judicial function, at its highest level of abstraction, involves the realising of these aims. It is this perhaps which has provoked the substantial debate(*e*) (at a lower level of abstraction) on the nature of the judicial function.

In this debate two major schools of thought are distinguishable. The first of these may be styled "the passive school". It sees the erosion of the judicial role during the past century by the enormous increase in the scope and volume of legislation. The Judge today, according to this school, performs only the rather mechanical tasks of applying the plain meaning of legislative language and entrenched common law principles to the particular fact situations coming before him. Thus the judicial function is best described as administrative; "but because the judiciary is the voice of the law, its role is generally thought to be more important than, in fact, it is"(*f*). Any departure from this mechanical judicial stance is anathema to the "passive school" as it places in jeopardy the prized legal qualities of impartiality and predictability.

The second school of thought may be styled "the creative school" or, perhaps, "the dynamic school". Whatever the appellation, this school begins with the uncontested proposition that the Judge must declare the law. After recognising that the power of declaration carries with it the power of manufacture(*g*) the conclusion is reached that law is freely made or, at least, synthesised by the Judges. This dynamic judicial stance is, of course, necessary if the prized legal qualities of flexibility and justice are to be attained.

Rather than concluding at this point with the unhelpful observation that, as always, the truth rests somewhere between the two poles of the argument, the writer believes that an appreciation of the judicial function may be assisted by examining the judicial process.

The judicial process consists, in outline, of three distinct steps: (a) ascertaining the facts of a particular case; (b) applying the existing

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(*c*) The *Dominion*, Wellington, 14 May 1973, p 1.

(*d*) *The Judiciary* (The Report of a "Justice" subcommittee, chaired by Peter Webster, QC), (London, 1972), p 4.

(*e*) Not least among the Judges themselves: see the classic dichotomy of approach exhibited by Denning and Asquith LJJ, in *Candler v Crane, Christmas & Co* [1951] 2 KB 164, 178, and 195.

(*f*) Lord Devlin, "Law in a Restless Society" [1973] 123 New LJ 86, 87.

(*g*) Cardozo, *The Nature of the Judicial Process* (Yale, 1921), p 124.

law to the facts; and (c) pronouncing the consequences arising from the application of the law to the facts. Within each of these steps there is an area where a discretion must be exercised by the Judge presiding over the process. During step (a) the Judge may or may not believe or attach substantial weight to the evidence of a particular witness, he may or may not take judicial notice of certain matters, and he may or may not permit counsel to introduce or pursue a particular line of argument.

During step (b) the Judge may be dealing with an area of the law regulated by statute, or by the common law, or with an area hitherto unregulated. If a statute must be considered then the Judge may interpret the provisions in a "strict" manner or in a liberal manner and, for the time being, the words of the statute will mean precisely what the Judge has said that they mean. If previous judicial decisions are to be considered these may be followed, not followed, or distinguished on the facts by the Judge. If there is no authority on the matter at hand then the Judge must formulate new law accordingly to widely phrased principles.

During step (c), involving such matters as sentencing and assessing or reviewing tortious damages, the Judge is frequently confronted with a very wide area of discretion and with very little assistance available from the statutes, from counsel, or from precedents(*h*). In addition to these common law discretions are many instances where legislation has conferred specific discretions upon the Courts instead of enunciating precise legal rules(*i*).

Judicial decisions are of great significance:

> "the criteria by reference to which the majority of our disputes are settled are those established by the courts, ie the Judges"(*j*).

The examination of the judicial process strongly suggests that these decisions invariably involve the exercise of one or more forms of judicial discretion. Because of this (and despite the limitations imposed upon the exercise of many discretions by the Judges themselves) there continues to be a number of judicial decisions which turn ultimately upon the identity of the person making the decision. From this the writer is inclined to the view that the judicial function includes a creative potential which cannot be overlooked and which most definitely warrants an examination of judicial personnel.

Judicial appointments 1946-1972

The statutory mechanics of judicial appointment in New Zealand are contained in the provisions of the Judicature Act 1908. Section 4 (2) of the Act provides:

> "The Judges of the Supreme Court shall be appointed by the Governor-General in the name and on behalf of Her Majesty."

This section must be read in the light of constitutional reality: in making appointments under s 4 (2), the Governor-General is, in fact, merely formalising a "recommendation made by the Minister of Justice (or, in the case of the appointment of the Chief Justice, by the Prime Minister) of the day.

Section 6 of the Judicature Act provides:

> "No person other than a barrister or solicitor of not less than seven years' practice of the Supreme Court, or a barrister or advocate of not less than seven years' practice in the United Kingdom, shall be appointed a Judge"(*k*).

This section imposes significant restrictions upon the power of appointment contained in s 4 (2): the pool from which judicial appointments may be made is limited to lawyers with the prescribed degree of practical experience.

Section 13 of the Judicature Act provides for the mandatory retirement of all Judges (excepting temporary appointees) upon their attaining the age of seventy-two years: this restricts further the pool from which judicial appointments may be made(*l*), to lawyers having at least seven years' practice and not having attained the age of seventy-two years. A minimum age limit of twenty-eight years for judicial appointees is effectively established by the minimum are restriction upon admission to the legal profession, ie twenty-one years, together with the seven years' practice requirement of s 6 of the Judicature Act.

(*h*) Supreme Court Judges in New Zealand receive some assistance from precedents in matters of sentencing in that they have access to a record of past sentences imposed by the Court for particular offences.

(*i*) See D F Dugdale, "The Statutory Conferment of Judicial Discretion", [1972] NZLJ 556.

(*j*) *The Judiciary* (London, 1972), p 6.

(*k*) Section 6 of the Judicature Act was amended in 1957, ie, during the period to be examined, by the substitution of the word "practice" for the word "standing" in two places.

(*l*) This is a very minor restriction upon the pool: only one person over 65 years of age was appointed as a permanent Judge of the Supreme Court during the period from 1946 to 1972 and it is inconceivable that any person over 70 years of age would receive such an oppointment. It is, of course, equally inconceivable that any person aged less than 30 years would receive such an appointment.

In recommending judicial appointments successive Ministers of Justice have drawn only on a much smaller pool of candidates than is suggested by a reading of the Judicature Act. The proportions of this pool of judicial candidates emerge from an examination of the permanent judicial appointments made, under s 4 (2) of the Judicature Act, during the twenty-seven years from January 1946 to December 1972. A total of thirty-six such appointments were made during this period(*m*). These appointments are examined under various heads as set out below:

(a) *Age.*—The average age of the Judges at the time of their respective appointments was marginally in excess of 50 years. The oldest person to be appointed a permanent Judge in this period (Tompkins J) was aged 67 years at the time of his appointment; the youngest (T A Gresson J) was aged 42 years when appointed. The range of ages on appointment of the Judges is outlined in the chart below:

Age	*Year of appointment*					
	1946 –52	1953 –57	1958 –62	1963 –67	1968 –72	Total
65–69:	–	–	–	1	–	(1)
60–64:	4	–	1	–	–	(5)
55–59:	2	3	4	–	1	(10)
50–54:	2	5	1	2	–	(10)
45–49:	–	–	2	1	5	(8)
40–44:	–	1	–	–	1	(2)
						(Total: 36)

The chart shows that almost 80 percent of the Judges were appointed when aged between 45 years and 59 years. Also shown is a trend toward the appointment of younger men: in the 1946-1952 period 50 percent of the appointments were of men aged between 60 years and 64 years; in the 1968-1972 period over 70 percent of the appointments were of men aged between 45 years and 49 years.

It is noteworthy that, in 1955, the *New Zealand Law Journal* at (1955) 31 NZLJ 71 commented on the appointment of Henry J (then aged 52 years) thus:

> "the appointment of suitable young men while they are comparatively young, as he is, enables Judges to familiarise themselves with their new duties and habituate themselves to their new life when they are in their mental and physical prime, and when a long career of judicial office is almost certain to follow. If young men are available, the appointment of older men, however suitable, should be avoided as that practice entails too brisk a circulation of judicial office."

By coincidence or otherwise, these comments prefaced what appears to have been a deliberate policy of appointing younger men to the Bench: the average age on appointment of the twelve Judges appointed prior to Henry J was 57.0 years; the corresponding age for the twenty-three Judges appointed after Henry J, ie until the end of 1972, was 49.9 years.

It is also noteworthy that the practice of appointing younger men to the Bench has had no effect upon the average age of sitting Judges. In 1946 the average age of the Judges of the Supreme Court(*n*) was 63.8 years. In 1972 the average age of the Judges of the Supreme Court(*o*) was 63.5 years. The effect of appointing younger men to the Bench has been, as the *New Zealand Law Journal* predicted in 1955, to restrict the circulation of judicial office and ensure a long career as Judge for those appointed.

(b) *Social background.*—The attitudes of any individual will usually reflect the experiences of that individual. Some of the earliest (and often the most impressive) experiences are imposed on an individual by those circumstances which may be described loosely as his social background. There are almost certainly significant and interesting correlations between the social background of Judges and their judicial performance but, in the absence of extensive judicial biographies, it is not possible to pursue the matter. Nevertheless, there are some points relating to the social background of Judges which are worthy of note.

Recent sociological research involved the assignment of the Judges appointed in England between 1820 and 1968 into social classes according to the occupations of the Judges' fathers(p). It was found that 47.4 percent of the 386 English Judges appointed during this period could be assigned to the "upper-middle"

(*m*) O'Leary, Barrowclough, and Wild CJJ; K M Gresson, Stanton, Hutchison, Hay, P B Cooke, F B Adams, North, Turner, McGregor, Shorland, Henry, T A Gresson, McCarthy, Haslam, Cleary, Hardie Boys, Haggitt, Macarthur, Richmond, Leicester, Woodhouse, Perry, Wilson, Tompkins, Moller, Speight, Roper, White, Beattie, Quilliam, McMullin, Mahon, and R B Cooke JJ.

(*n*) Ie, Myers CJ, Blair, Smith, Kennedy, Johnston, Fair, Callan, Northcroft, Finlay, and Cornish JJ.

(*o*) Ie, Wild CJ, Turner P, McCarthy, Richmond, Henry, Haslam, Macarthur, Woodhouse, Perry, Wilson, Moller, Speight, Roper, White, Beattie, Quilliam, McMullin, Mahon, and R B Cooke JJ.

(*p*) *The Judiciary* (London, 1972), Appendix II: Class Assignment According To Father's Occupation (an analysis taken from an unpublished M Phil Dissertation—University of London—by Jenny Brock).

class; this class was defined so as to include the professional occupations, merchants and other "middle-range entrepreneurs", MPs, small landowners (as distinguished from the traditional landed gentry), professors, editors of local newspapers, and senior civil servants (but not Heads of Government Departments). Only 1.3 percent of the English Judges could be assigned to the "working" class; this class being defined to include craftsmen and unskilled workers. Statistics relating to the 86 English Judges appointed between 1951 and 1968 are virtually identical with those for the longer period.

If the format of the English research is applied to the Judges appointed in New Zealand between 1946 and 1972, ie, they are assigned to social classes according to the occupation of their fathers(*q*), then approximately 60 percent of these can be assigned to the "upper-middle" class(*r*). This suggests that, in both England and New Zealand, at least one-half of the Judges are drawn from a narrow social strata. In addition, all of the Judges are associated with the "upper-middle" class by virtue of having been practising lawyers prior to their judicial appointment. A New Zealand analysis differs from the English in that approximately 25 percent of the New Zealand Judges could be assigned to the "working class", ie their fathers were craftsmen or unskilled workers.

As a conclusion to the discussion under this head, the writer would draw attention to the fact that assumptions or conclusions founded upon any form of analysis of the social background of particular individuals are liable to be frustrated by the impact of subsequent experiences upon these individuals.

(c) *Education.*—With respect to the secondary education of the Judges appointed during the period under examination the writer must be content with the making of three observations. First, a great many of the Judges attended the same schools(*s*). Second, a relatively high proportion of the Judges attended private schools(*t*). Third, relatively few of the Judges attended coeducational secondary schools(*u*). The writer does not suggest that these observations are of great significance. It is sugegsted, however, that these observations show that the Judges should not be regarded as a group representative of the community at large.

All but two of the Judges received academic legal training at the constituent colleges of the University of New Zealand, ie Auckland, Victoria, Canterbury, and Otago. The exceptions were Hardie Boys J, who obtained his legal training through articles, and T A Gresson J, who was admitted to the English Bar after attending Cambridge University and was admitted to the New Zealand Bar one year later. The distribution of graduates from the various university Colleges among the Judges was relatively even with Victoria having produced a slightly higher proportion than the other Colleges.

Eleven of the Judges graduated as Masters of Laws from the University of New Zealand. Three Judges (F B Adams, Turner, and McGregor JJ) took arts degrees at the University of New Zealand. Three Judges (Haslam, Moller, and R B Cooke JJ) studied—on postgraduate scholarships—at the English Oxbridge university Colleges.

(d) *Legal Practice.*—Although the legal profession in New Zealand is fused, unlike the English situation, the English practice of appointing Judges exclusively from among the ranks of successful barristers has been consistently followed in New Zealand(*v*). One-third of the Judges were practising as Queen's Counsel at the time of their appointment (including Wild CJ, and White J, both of whom took silk upon taking up appointments as

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(*q*) These occupations were: lawyer (11—including two Judges and one Stipendiary Magistrate); clergyman (2); company secretary (2); blacksmith; storeman; newspaper editor; farmer; secondary school teacher; postmaster; civil engineer; cycle engineer; engine driver; merchant; inspector of schools; railway guard; clerk; storekeeper; secondary school headmaster; jeweller; machinist; company manager; prison warder; broker; and labourer.

(An impression of dynastic tendencies in the legal profession in New Zealand, gained by the writer from a reading of the chapters on "The Districts" in R B Cooke QC, (editor) *Portrait of a Profession* (Wellington, 1967), would seem to be supported by the fact that 31 percent of the Judges appointed in New Zealand between 1946 and 1972 were the sons of lawyers.)

(*r*) The concept of social class, although disliked by many New Zealanders, is not entirely valueless in the New Zealand situation. Social class, it is submitted, is a convenient (if generalised) description of a relatively broad section of society enjoying a certain degree of prestige from the other sections of society and exhibiting some uniformity in the areas of social assumptions and social aspirations.

(*s*) Almost 50 percent of the Judges attended four schools: Auckland Grammar (5); Wanganui Collegiate (5); Wellington College (4); and Otago Boys High School (3).

(*t*) Almost 40 percent, ie, 13, of the Judges attended private schools, cp, 16 percent of all secondary students in 1971.

(*u*) Because (a) private schools are not coeducational; and (b) prior to 1945 few State secondary schools were coeducational.

Solicitor-General). The practice of appointing Queen's Counsel to the Bench has increased in recent years: of the 13 judicial appointments from the beginning of 1962 until the end of 1972 no fewer than seven were of Queen's Counsel.

Besides practice at the Bar many Judges had experience on or assisting various public inquiries into particular aspects of New Zealand society prior to their appointment to the Bench. Examples of this include Woodhouse J (as he became), counsel assisting the commission of inquiry into Fluoridation, and Perry J (as he became), chairman of the courts of inquiry into the loss of the ships *Holmburn* (in 1958) and *Holmglen* (in 1960)(*w*).

A distinctly successful legal practice was one factor shared by the Judges. In addition, most Judges had been prominent in the affairs of their District Law Society and in the New Zealand Law Society(*x*).

(e) *Geography.*—The practice of appointing Judges from among those lawyers who specialise as barristers has had a marked effect upon the geographical derivation of the Judges. In Auckland, Wellington, and Christchurch, the Supreme Court is continuously in session but outside of these centres there is a limited amount of work available to a person specialising as a barrister. Thus, although less than 50 percent of all lawyers practised in the three main centres during the 1946-1972 period, 85 percent of the Judges were practising in these centres at the time of their appointment, ie 30 of the 36 Judges; five of the Judges had practised in small provincial centres before practising in the centres.

Much of the information on the geographical derivation of Judges can be conveniently set down in the form of a chart:

	1946 –52	1953 –57	1958 –62	1963 –67	1968 –72	Total
Auck.:	2	3	3	2	1	(11)
Wgtn.:	3	3	3	1	2	(12)
Chch.:	2	2	1	–	2	(7)
Other Centres	1	1	1	1	2	(6)
						(Total: 36)

The Judges from "other centres" comprised Tompkins and McMullin JJ (from the Hamilton Bar), F B Adams J (from the Dunedin Bar —which appears to have suffered a substantial decline in judicial fortunes since the Second World War), McGregor J (from Palmerston North), Woodhouse J (from Napier), and Quilliam J (from New Plymouth). With the exception of the two Hamilton Judges, these Judges held appointments as Crown Solicitors for the centres in which they practised; this fact is perhaps not surprising for the Crown Solicitor would be among the few lawyers in such centres assured of regular Court work.

The chart suggests that there may have been a conscious attempt to achieve a degree of geographical balance in judicial appointments(*y*); pure coincidence is the alternative but, to the writer, hardly convincing explanation of the virtually constant distribution of the judicial appointments among the geographical sources throughout the 1946-1972 period.

(f) *Sex.*—The practice of appointing Judges from among the ranks of successful barristers may have contributed to the fact that all of the Judges were male. Of approximately 3,000 practising lawyers only 1 in 70, ie, a total of less than 50(*z*), are women. Of these 50, only one or two have a significant practice in the Courts. That the substantial arithmetic odds against a woman being appointed as a Judge are not insurmountable would seem to be shown by the recent appointment of a woman to the English High Court Bench.

(g) *A Summary.*—In view of the vital importance of the judicial office it is far from improper to inquire as to the characteristics of those attaining such office. Such an inquiry may be answered from the preceding sections of this paper thus: the person appointed to be a Judge in New Zealand in the years since the Second World War is a middle-aged Caucasian male; he is well-educated; and he is a successful and prominent member of the legal profession and, as such, is almost certainly wealthy, a member of the upper-middle class, and lives in an urban environment.

Judicial qualities are sought and frequently

(*v*) The only exceptions to this practice during the period under examination appear to be the appointments of K M Gresson J (in 1947) and Hay J (in 1949).

(*w*) The appointment of Mr R K Davison, QC, as chairman of an inquiry into the Parnell fumes incident of April 1973 is a recent illustration of the practice of using leading barristers to man public inquiries.

(*x*) No fewer than 20 Judges had served as President of their District Law Society.

(*y*) In 1972, the geographical composition of the Judges of the Supreme Court (see note (*o*), supra) was: Auckland, 7; Wellington, 5; Christchurch, 4; and other centres, 3.

(*z*) See *New Zealand Official Yearbook 1972*, p 238.

assumed within this framework of characteristics. Such assumptions are perhaps due for an investigation.

Judicial appointments—Reform

The proposition that the probability of a successful appointment is increased by enlarging the pool of candidates seems incontrovertible. In view of this it seems reasonable to inquire as to whether or not the pool available for judicial appointments in New Zealand is unduly restricted. Section 6 of the Judicature Act 1908 effectively restricts this pool to practising lawyers, ie, approximately one percent of the total New Zealand population. This provision ensures that any person appointed to be a Judge in New Zealand has a wide knowledge of the law and its workings; such knowledge would seem to be essential to the performance of the judicial function.

The practice of appointing Judges from among barristers appears to be traditional rather than essential. It is the English view, apparently endorsed by the legal profession in New Zealand, that "experience and standing at the Bar with their necessary implications are the only reliable assurance of capacity and competence as a Judge"(*a*). These necessary implications are said to include skill in the appreciation and explanation of the relevant facts in a case, skill in oral proceedings, practice in the writing of opinions, and the high degree of integrity associated with the Bar(*b*). Two points may be made in reply to these assertions. First, the practice of appointing leaders at the Bar to Judgeships is not foolproof: some such appointments in the past have been recognised as less than satisfactory. Second, the accepted judicial qualities, ie, "Impartiality, the gift of wise silence, wide knowledge of the law, a quick grasp of fact, and vast experience of human nature"(*c*), are not the exclusive preserve of those who choose to specialise in Court appearances.

There is, the writer submits, a strong case for the enlargement of the pool of candidates from which judicial appointments in New Zealand are actually made. Steps which might be taken to ensure this enlarged pool are discussed below.

(a) *Judicial promotion.*—By judicial promotion is meant the practice of appointing lawyers who have not had great experience at the Bar, ie, many solicitors and academic lawyers, to the Magistracy and subsequently, in suitable cases, promoting them to the Supreme Court Bench. With the introduction of the Courts Act 1971, this practice is now an established part of the English judicial appointment procedure. The main advantage of a system of judicial promotion, besides enlarging the pool of candidates for judicial office, is that persons who have demonstrated judicial qualities and temperament can be appointed to the Supreme Court Bench. One side-effect of judicial promotion in New Zealand could be the erasing of the "second-class" stigma at present attached to the Magistracy.

The traditional anathema of the legal profession in New Zealand towards judicial promotion appears to be founded upon two contentions: first, that judicial promotion will encourage Magistrates to tout for promotion, ie, tend to decide cases in favour of the Crown; and second, that there will be frustrated and bitter Magistrates who have expected but not received promotion. These contentions have not been regarded as persuasive with respect to promotion from the Supreme Court to the Court of Appeal and, the writer submits, should be similarly disregarded with respect to promotion from the Magistracy to the Supreme Court(*d*).

(b) *Judicial appointments committee.*—At present, the Minister of Justice consults with the Chief Justice, officers of the New Zealand Law Society, and, perhaps, his Solicitor-General and personal acquaintances in the legal profession before making an appointment to the Supreme Court Bench. In addition, a proposed appointment may be vetoed during the course of Cabinet discussion. If persons other than prominent barristers are to be appointed or, at least, considered for appointment then this procedure is manifestly unsuitable. In the past, practice at the Bar has been used as a filter to narrow down the field of judicial candidates. If, as the writer suggests, this filter is removed then it must be replaced with another and less crude device. The obvious device would seem to be some form of committee(*e*).

(*a*) (1928) 4 NZLJ 321: a letter, dated 2 November 1928, to the then Attorney-General from the Wellington District Law Society; 45 years have produced little evidence of a change in the attitude of the legal profession.

(*b*) As to the integrity of the Bar, see the passionate comments of Henry Cecil, *The English Judge* (London, 1971), pp 14-15.

(*c*) Viscount Kilmuir of Creich, LC, "Judicial Qualities", (1960) 36 NZLJ 112, at p 114.

(*d*) Membership of the Court of Appeal in New Zealand involves, as a matter of course, a knighthood and seniority over puisne Judges.

The characteristics of such a committee might be:

(1) A membership of ten persons comprising the Chief Justice, four legal practitioners (nominated by the New Zealand Law Society for specified terms and ineligible for judicial appointment while on the committee), and five others (perhaps laymen, politicians and judicial officers) appointed by the Minister of Justice for specified terms;

(2) An annual meeting to consider nominations of candidates for judicial and magisterial office (such nominations coming from individuals, the District Law Societies, and the Minister of Justice) and preparing "short lists" of, say, fifteen practitioners suitable for appointment to the Magistracy and, say, ten practitioners and Magistrates suitable for appointment to the Supreme Court Bench; and

(3) All vacancies in the Magistracy and the Judiciary to be filled by the Minister of Justice from the lists prepared from the committee(*f*).

A committee such as is suggested above would be seen to be established for a specific purpose, it would be seen to be non-political, and it could be seen that there exists a coherent procedure for making judicial appointments.

(c) *Judicial retirement.*—There is a strong case for having young men sitting as Judges:

> "The incidence of arteriosclerosis (which gradually and almost imperceptibly impairs the faculties) increases greatly after the age of fifty; furthermore the older a person becomes the less naturally receptive he becomes to new attitudes and ideas. This all matters greatly in Judges because of their security of tenure and because of the great power they wield; the English practice of relying upon a single Judge at first instance merely aggravates the problem(*g*).

In New Zealand, at least, there is the additional factor of the substantial amount of arduous circuit work required of puisne Judges of the Supreme Court.

The appointment of younger persons as Judges does not of itself bring about a younger Bench. Such appointments bring with them the possibility of a judicial tenure of over thirty years. This long tenure is not entirely beneficial to the community. A Canadian Judge has spoken recently of judicial isolation:

> ". . . the isolation that sets in upon the acceptance of judicial office. The isolation grows with the years of service, with age taking its toll of energy, and this is accentuated if there is an increasing workload"(*h*).

To bring about a younger Bench requires some alteration to the mechanics of judicial retirement.

At present s 13 of the Judicature Act 1908 provides that all Judges (except temporary appointments) must retire upon attaining the age for the mandatory retirement of Judges to, cases, resigning), a Judge becomes entitled to a retiring allowance if he has held office for at least five years; this allowance is provided for and assessed in accordance with s 76 of the Superannuation Act 1956. The maximum allowance, the equivalent of sixteen twenty-fourths of the Judge's annual salary at the time of his retirement or resignation, is limited to those Judges who have held office for at least twenty years. This means that there is a strong financial inducement for Judges to remain in office. In addition, many Judges seem to feel that, as a matter of duty, they should hold their judicial office for as long as possible.

In view of the desirability of a younger Bench and the fact that the age for retirement in the community at large is diminishing, some changes relating to judicial retirement are perhaps due. These might include: reducing the age for the mandatory retirement of Judges to, say, 65 years; introducing a limitation period of, say, 20 years upon the holding of a judicial office; and amending the Superannuation Act 1956 so that a Judge may resign with the maximum retiring allowance after no more than 15 years service.

If the changes suggested above are made then the pool for judicial appointment is enlarged by removing the danger of judicial isolation inherent in the appointment of younger persons as Judges.

One side-effect of the implementation of the changes to the mechanics of judicial retirement suggested above would be the creation of an extremely competent pool of persons to man the various public inquiries which, in the past, have frequently been assigned to sitting members of the judiciary.

(*e*) This has been suggested recently by the Minister of Justice (Hon A M Finlay, QC): *Evening Post*, Wellington, 28 April 1973.

(*f*) The committee suggested in this papar is a synthesis of two North American systems: the Canadian system, see John L Farris, "Let's Kill All The Lawyers", [1973] NZLJ 60, 63: and the Oklahoman system, see *Judicature*, v 54 (October, 1970), at pp 114-118.

(*g*) *The Judiciary* (London, 1972), p 63.

(*h*) Bora Laskin, "The Judge as an Institution", (1972) 7 Israel Law Review 329, at p 338.

Conclusion

It seems likely that no system of appointment can be perfect. The present system of judicial appointment in New Zealand has yielded a perhaps unhealthy uniformity among the persons appointed as Judges. A number of changes, some of which have been discussed in this paper, could make for a slightly less imperfect system: a system more capable of ensuring that "The eccentricities of judges balance one another"(*i*).

J E HODDER

(*i*) Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale, 1972), at p 177.

DONATIO TAXATIONIS CAUSA?

The recent first instance decision of Walton J in *Nichols v IRC* [1973] 3 All ER 632 may be of interest in New Zealand as having some bearing on the application of section 11 of the Estate and Gift Duties Act 1968, the section which charges to Estate Duty gifts inter vivos, whenever made, when the donor retained some element of possession, enjoyment or benefit in the gifted property during the three year period before his death.

The deceased had owned the entire fee simple in the family estate. In 1954 he decided to give the estate to his son, but wished to continue living there much as before. He was advised to transfer the estate to his son, who would lease back to the deceased the bulk of the estate for a term of five years, then from year to year. Rent was fixed at £557.10s pa, that being the annual value of that part of the estate for the purpose of Income Tax under Schedule A. The son, who was then still an undergraduate, was not consulted when this scheme was being devised, and, the Judge found, merely placed his signature wherever it was requested. The deed of gift was drawn up, and took effect on 24 June 1955. The lease was supposed to be executed that same day, but a difficulty arose, and so it was not in fact executed until 16 July 1955. The deceased died in December 1962, and the IRC claimed estate duty on the gifted estate under the Finance Act 1894, s 2 (1) (c) (as amended), as "property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise". The son objected to this claim, and took out a summons seeking determination of certain questions, the first being "whether on the true construction of the deed of gift . . . and the lease . . . the property taken by the plaintiff under the deed of gift comprised (a) the fee simple in possession of the house and lands . . . or (b) the reversion thereto expectant on the determination of the lease".

The primary question to be answered, therefore, was, quite simply, what was the subject matter of the gift. Counsel for the plaintiff argued that where property is given charged with an equitable obligation to grant a lease back to the donor, all that is given by the donor is a reversionary interest in the property similar to the gift of the land shorn of the partnership rights in *Munro v CSD* [1934] AC 61. If this so, the lease cannot infringe that (limited) gifted property, so s 2 (1) (c) cannot catch the gift. Moreover, this particular transaction occurred more than five years before the donor's death (that being the relevant period at that time) so the gift of the reversion could not be charged to estate duty either. Counsel for the Commissioners argued exactly the opposite, ie that where such a transaction occurred the subject matter of the gift is the entire property, citing *Lang v Webb* (1912) 13 CLR 503. If this were so, the lease would be a reservation by the donor, acting upon the gifted property, and so the gift would fail for estate duty purposes.

Walton J held that he could not simply choose between these two apparently potential rules of law, even though that might seem an attractive answer. Questions such as this are not matters of pure law, but instead have a high content of disputable facts. The Judge decided that *Lang v Webb* does not lay down a fixed rule of law in the case of a transfer of land as a gift followed by an immediate lease back; the case turns on its own facts (admittedly very similar to those in the instant case), in particular the finding by the Court that the gift there was an unqualified gift of the whole interest in the land. The inference is quite clear, particu-

larly from the judgment of Isaacs J, that if the facts had been marginally different the result might have been completely different. That case was therefore distinguishable if necessary. The Judge then considered the position where the donor conveys property to a trustee to hold it on trust as to some interest for a beneficiary (donee), and as to the remaining interests for the donor. All that the donor has given there is the property minus the interests held in trust for the donor (*Munro v CSD*). Developing this argument, it would make no difference if the trustee were eliminated, and the donee took directly, but subject to a real equitable obligation to grant the lease back. The donee is then in the same position as the trustee. There is no case directly on the immediate retention of a lease other than *Lang v Webb*, but the Judge relied on authority in the obviously analagous cases concerning the retention of rentcharges, particularly *St Aubyn v Attorney-General (No 2)* [1952] AC 15. He quoted from the judgment of Lord Radcliffe, who in turn quotes a passage from Lord Russell's judgment in *CSD (NSW) v Perpetual Trustee Co Ltd* [1943] AC 425:

> " . . . the entire exclusion of the donor from possession and enjoyment which is contemplated . . . is entire exclusion from possession and enjoyment of the beneficial interest in property which has been given by the gift, and . . . possession and enjoyment by the donor of some beneficial interest therein which he has not included in the gift is not inconsistent with the entire exclusion from possession and enjoyment which the subsection requires."

Every case will therefore depend heavily upon its own facts, and the Judge now turned to the question whether, on the facts of this particular case, the son took the estate subject to any equitable obligation to grant the lease (bearing in mind that the principles of the secret trust can apply to gifts inter vivos as well as gifts by way of succession). He decided that the son had been excluded from almost all of the dealings between the donor and his advisers, including the last-minute alteration of the lease, and that the whole scheme (including the affidavits before him) was framed to look as though there was such an obligation—It is quite clear that (the donor) and his advisers were simply calling the tune, and (the son), as a dutiful son, was quite prepared to execute any dance they required. That is highly commendable and filial, but miles removed, in my judgment, from (the son) being under any equitable obligation". In all the circumstances, Walton J held that what was in fact given here was the entire fee simple of the estate, so that the lease was a disqualification of the gift, and estate duty would be payable.

Four points might be made by way of comment upon this case. The first is the relative willingness of the Court to follow *Munro's case* wherever it can be shown that the donor really intended to give only a limited gift or interest, ie where there was a retention of some property or some interest in the property, and not a gift of the entire corpus with some disqualifying reservation in favour of the donor imposed upon that gifted property. This attitude towards the primary question in any case on s 11 (what is the gifted property?) is, of course, most useful to the careful tax planner, whose concern then is to ensure that the right construction will be put on the transactions, in all the circumstances of the case. It must be noted, however, that it is not an attitude which antipodean Courts are famed for their desire to share (see, for example, *CSD v Owens* (1952) 88 CLR 67). Although it may suffer from the practical disadvantage of raising difficult questions of fact in any given piece of litigation, the distinction between retention and reservation is a perfectly logical one, and should not be artificially limited, even if it is a potential revenue loser.

The second point concerns the question of the timing of the transactions. It is superficially attractive to distinguish between retention and reservation on the simple ground of whether the interest was "carved out" (to use a neutral term) before or after the property was gifted. Walton J, at p 637, quotes a passage from *Dymond on Death Duties* (15th ed, 1973) on the effect of the St Aubyn case, which contends that if the rentcharge is created before the property is assigned there is no "reservation", but if it is created after the assignment there is, at least prima facie, a "reservation". Problems of course arise, as Dymond admits, where the two transactions are contemporaneous (see below, point three). This approach, it is submitted, is too easy, simple to the point of being merely mechanical, and moving too far away from the realities of the transactions, although it must be admitted that it has had considerable importance in the past (see, for example, *Re Nichol (No 2)* [1931] NZLR 718; *Rudd v CSD* (1937) 37 SR (NSW) 366).

The present case is of interest because Walton J seems to have placed far more emphasis on an analysis of all the facts. If he had wished to apply the mechanical timing test, this case could have been decided very easily, as, due to an omission in the drafting of the lease, it was not executed until several weeks after the land was conveyed. However, this fact was not treated as anything like conclusive; indeed, the Judge was prepared, if necessary, to invoke the maxim "Equity looks on that as done which ought to be done, so that if there is an immediate equitable obligation on the donee to grant a lease back, this can, in equity, be looked on as if it had indeed happened at the very moment of the conveyance itself," thus circumventing any argument based purely on timing. In a wider context, this could be viewed as an emphasis on substance rather than form; more particularly, it indicates that timing may not be important per se, but rather as one more piece of evidence as to the realities of the situation. If this is so, of course, it could conceivably work both ways, so that the fact that the interest was carved out before the conveyance would no longer be conclusive that there was no "reservation".

The third point concerns the situation where the "retention" and the conveyance are contemporaneous. The law here is uncertain, and *Munro* is no direct help, as there the partnership rights clearly arose before the land was conveyed. In theory, there is no reason why contemporaneity should make any difference to the possibility of a valid retention—why should the donor not be able to specify what he wishes to retain at the same time as making a gift of the rest? The passage referred to in Dymond admits of that possibility (even though there may be considerable difficulties of proof), but there may be Australian and New Zealand authority that contemporaneous transactions are not enough to avoid s 11 (eg, *McFarlane v CSD* (1965) 66 SR (NSW) 166), especially when ideas of Novation are raised, which again can disqualify the gift—"Novation may be inferred from the act of giving or indicated by any contemporaneous transaction" (Richardson, Essays, p 89). It is submitted that this approach is quite inconsistent with the rationale behind *Munro,* though unfortunately not inconsistent with its narrowest ratio. *Nichols v IRC* is of interest again, not only because of the lack of emphasis on timing per se, but also because the Judge expressly states that there is no reason why contemporaneous transactions should necessarily be caught by s 11. At p 637E, Walton J says, ". . . I think it is quite plain . . . that there is no legal impediment to regarding simultaneous transactions (eg, conveyance and reservation of rentcharge, conveyance and lease back) as only giving the donee the property as so charged in the one case, or the reversion expectant on the lease in the other case". This could be particularly important when combined with the possibility of two separate transactions being viewed as simultaneous provided there exists a definite equitable obligation to complete the second transaction. Again, it is logically satisfactory, and could be of assistance to the tax planner.

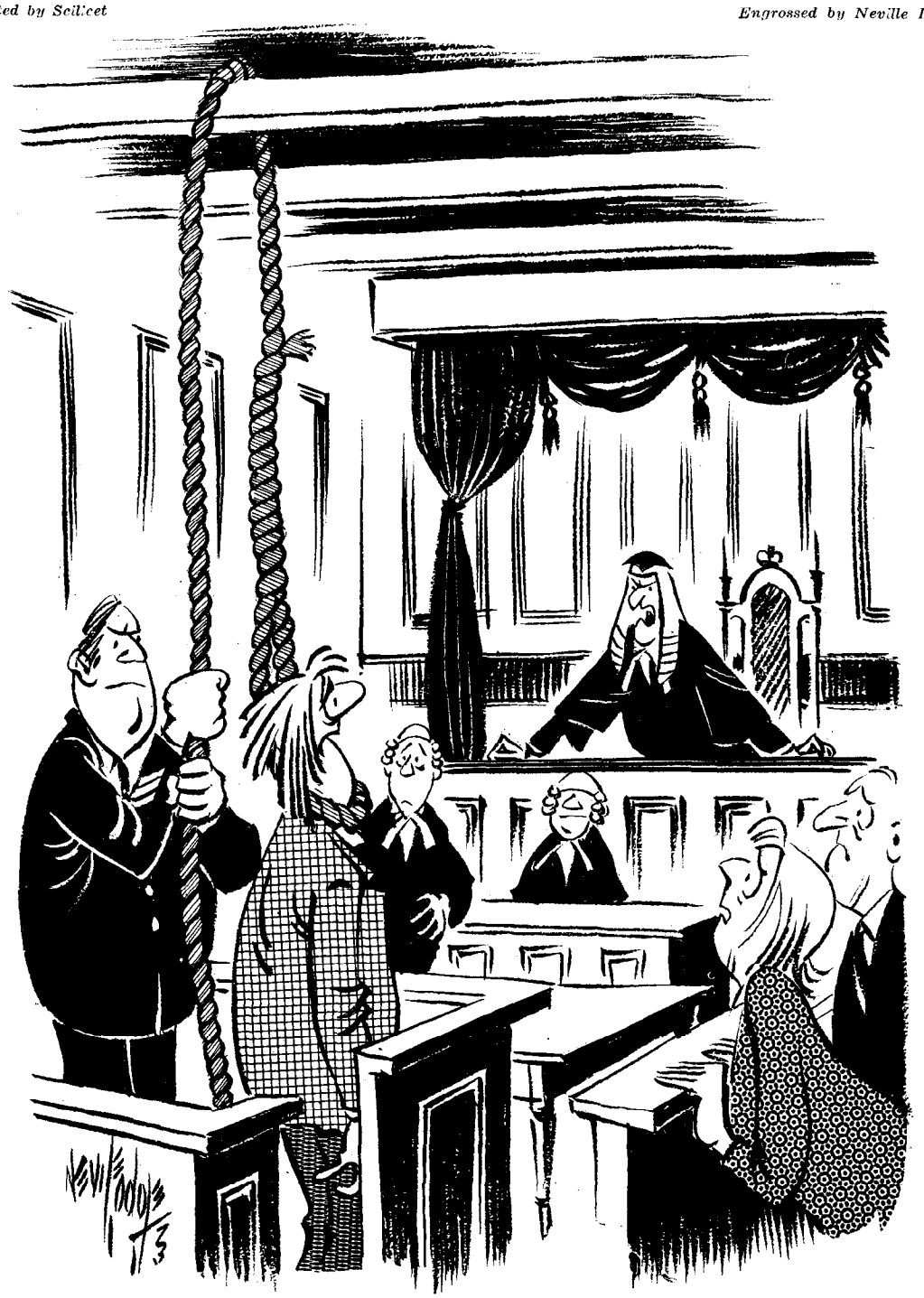
The fourth point is that there was, in the summons, a second line of argument for the plaintiff, namely that even if the Court were to hold that the gifted property was the entire fee simple in the estate, estate duty should not be payable because of the Finance Act 1959, s 35 (2). This provision, upon which the New Zealand s 11 (2) is closely modelled, was enacted to reverse the harsh effects of *Chick v CSD (NSW)* [1958] AC 435. It provides that where the property comprised in any gift was, inter alia, land, retention by the deceased of actual occupation or enjoyment of that gifted land shall be disregarded (ie, it shall not disqualify the gift for estate duty purposes) if for full consideration in money or money's worth. The donor's lease in the instant case was arranged to be for the sum equal to the land's valuation for Schedule A income tax purposes (which surely ought to have counted as full consideration, at least on the old income tax principle of blood out of a stone). However, for some reason undisclosed by the report, counsel for the plaintiff did not pursue the point, and so the Judge said that he did not have to decide upon it. This is rather strange, as surely this particular provision was designed to be of assistance in a case just such as this, a case which, in its essentials, bears considerable resemblance to *Chick's* case. Suffice it to say that these provisions do exist in New Zealand and the United Kingdom, and that they might well be decisive in a case such as this. There was a third question raised in the summons, but this concerned United Kingdom provisions relating to "Associated Operations", which have no New Zealand counterparts, so no comments on them are necessary.

It would seem that a considerable amount of money is at stake in this particular piece of litigation; the appeals are awaited with interest.

I T SMITH

"A FUNNY THING HAPPENED ON THE WAY TO COURT THIS MORNING . . ." : 3

Drafted by Scilicet *Engrossed by Neville Lodge*



"Not only must justice be done, but it must be SEEN to be done."

MEMORIES OF CALEB DIPLOCK

Caleb Diplock—the man whose will made legal history in *Chichester Diocesan Fund and Board of Finance* v. *Simpson* [1944] A.C. 341, but whose name brings back for me many memories of my childhood days. I remember thinking when I first heard the name what an odd name it was. The surname was common in the locality, but I had never before heard the name "Caleb", biblical though it may be—nor have I met anyone with that name since.

The village of Polegate, some five miles inland from Eastbourne in Sussex on the south coast of England, was his home. It was my home also for many years and I first went there to live as a small child. Nestled at the foot of the South Downs it was a peaceful spot with some 300-400 inhabitants, and Southdown Hall, the home of Caleb Diplock, was aptly named. There was one church, one chapel, one policeman (who served other villages in the area as well) and one doctor.

The village folk accepted that Caleb Diplock was a very wealthy man. Strangely enough he was never referred to as "Mr" Diplock, but always as "Caleb Diplock". He was looked upon with a certain amount of awe by some of the villagers and with respect by the community in general. He was not renowned for generosity, but it was this philanthropic facet of his character, as will be seen later, which after his death triggered off the protracted and disastrous litigation which, among other catastrophes, almost resulted in depriving some old and needy villagers of security and comfort in their declining years, and which also became responsible for a legislative change in the law.

A Miss Diplock, Caleb's sister, was often spoken of, and it was thought that there had also been another sister who had died. I do not recall ever hearing of a Mrs Diplock. The few people of the village who had been inside Southdown Hall spoke of "Caleb Diplock's gardener" and "Caleb Diplock's housekeeper", so we took it for granted that the household included at least a gardener and a housekeeper.

I suppose "Squire" would have best suited the position Caleb Diplock held in the village, had not this title already been attached to the Gwynne family of nearby Folkington Manor. Whether this title was just one of courtesy on the part of the village folk, or had some other significance, I never knew.

Once a year Caleb Diplock was honoured by the village people. Every year, in mid-summer, usually the first Sunday in August, the local dignitaries arranged a parade through the village for the benefit of the hospitals, and in particular for the Princess Alice Hospital in Eastbourne. This day was known as "Hospital Sunday". The parade comprised the local Girl Guides, Boy Scouts, Sunday-school children, Red Cross and St. John Ambulance contingents, and, of course, a band! At 2 p.m. on the chosen day we assembled in a field owned by Caleb and adjoining his grounds, and in procession marched through the village, the highlight being a parade through the grounds of Southdown Hall with Caleb and his household on the steps "taking the salute" as we passed by. It was generally thought that he was connected with the Princess Alice Hospital in some way and that this was the reason for the annual parade through his grounds. To me, and to most other children in the parade, the most interesting feature of the march through the Diplock grounds was that we were able to get a really good look at a magnificent statue of a stone-coloured stag in the grounds, which dominated the whole layout of the gardens. The parade always ended with a service in the village church. In those days, whenever Hospital Sunday was mentioned, Caleb's name was automatically associated with the conversation, and so far as I know, this was the only day of the year when the great gates of Southdown Hall were allowed to remain open. I remember, as I marched with the Girl Guides, thinking how old Caleb looked, and wondering if he had enough to eat!

One particular year the Girl Guide company funds were low, and unless they were replenished there would be no camping that summer. My mother therefore organised a concert to be held in the church hall, and my younger sister and I were told to call upon Caleb Diplock and sell him as many tickets as we could persuade him to buy. We didn't like the idea of this at all—rumour had it that he didn't like children! However, dressed in smartened-up uniforms and with polished badges we made our way to Southdown Hall one day after school and on reaching the huge front doors

knocked and waited. It seemed ages before the doors were opened by a tall, dignified-looking lady who asked our business. Between us we blurted out the story of the concert in aid of our funds and said we had come to see if Mr Diplock would buy some tickets. (This is the only time I can recall having referred to him as "Mr" Diplock.) The tall lady asked how much the tickets were—"One shilling for the back seats and one-and-sixpence for the front seats," I said. "Wait here—I'll go and ask him," she said, as she disappeared through another door. She came back after a few minutes—"He will take one one-shilling ticket, thank you," she said, holding out the shilling to my sister whilst I fumbled with the two dozen tickets I had taken with me to find just one one-shilling ticket. If our crestfallen looks registered with her she didn't show it. Somewhat deflated. we made our way back to the roadway and made our way home, but not before we had had a good long look at the lovely old stag statue. Our remarks to each other on the way home about a millionaire buying just a single one-shilling ticket were anything but complimentary. Whether he wasted it or allowed somebody else to use it we never knew.

Caleb Diplock died in 1936. At that time I was working for a firm of solicitors in Eastbourne whose offices were just a few doors from the firm of Wintle & Hodgson, the Diplock solicitors. Mr Wintle of that firm and our village doctor, Dr Hansen, were two of the executors and trustees. Dr Hansen had lived in Polegate for many years and his house and surgery were quite close to Southdown Hall. It was at this time that I learned Caleb's age —he was 95 when he died.

In 1937 the trustees were distributing the residue of the estate in accordance with their interpretation of the terms of the will, and they decided to build, on five acres of land near Southdown Hall, a number of bungalows to house the frail, elderly and needy folk of the village where they could live in comfort for the rest of their lives. Large sums of money had been distributed to various charitable organisations and hospitals. The will had directed that the residue should be used for "charitable or benevolent" purposes, and the building of the bungalows for the villagers came, I suppose, within the trustees' interpretation of those words.

As soon as the bungalows were completed, the selected villagers started to move in. I have no idea of the requirements for eligibility other than that age and residence in the village came into it, but those who were chosen were considered very fortunate.

The story of the Diplock fortune and the subsequent litigation over the construction and interpretation of the will is too well known for comment (*Chichester Diocesan Fund and Board of Finance* v. *Simpson* [1944] A.C. 341; [1944] 2 All E.R. 60) but it is interesting to recall what was at the time believed to have set in train the events which led to the institution of proceedings which in turn resulted in the finding that the residuary gift was void for uncertainty and that it failed completely. The little word "or" in the phrase "charitable or benevolent" was apparently the culprit and the words "charitable or benevolent" were the subject of much legal argument.

There are several Reports from 1940 to 1948 covering the various stages of the litigation, and I am puzzled by reference to one "Handson" as a proving executor in [1948] 2 All E.R. at pages 321, 322, and also to a "Mrs Handson" as his personal representative. Again on page 526 of [1947] 1 All E.R. there is mention of one "Lionel Edwin Charles Handson" as a proving executor.

Our doctor's name was "Lionel" but it was "Lionel Hansen", not "Handson", and so far as I can recollect he was never married but lived with his unmarried sisters, and upon his death it is likely that "The Misses Hansen" became his personal representatives. It could well be that "Handson" has been reported for "Hansen" and "Mrs Handson" for "The Misses Hansen". In an endeavour to try to clear up this point I have been in communication with my elder sister, who still lives at Polegate, and her recollection is the same as mine, i.e. that Dr Hansen's name was so spelt, that he was not married, and that he lived with his unmarried sisters.

It is also noted that the date of Caleb's death is stated in [1944] 2 All E.R. 72 and in [1944] A.C. 342 as 1938, whereas in fact it was 1936 as correctly stated in other Reports.

The residue of Caleb's estate was around a quarter of a million pounds sterling. Apparently he had no close relatives when he died, and the trustees had embarked upon the building of the bungalow homes to perpetuate his name in the village with which he had been so long associated.

After the estate had been wound up, some distant relatives came into the picture and decided to challenge the will, and they instituted proceedings. I have often wondered

about these distant relatives—who were they, and did they know about the old folk? A rumour current at the time was that those responsible for the institution of the proceedings were second or third cousins in New Zealand who died before the litigation ended and so derived no benefit for themselves anyway. There was also much talk at the time of a newspaper report which, it was said, referred to Caleb's once having changed the day of a weekly meeting he attended at Eastbourne to a day when the fare was one penny cheaper. I do not recollect reading this report, but I do remember having heard it spoken of. It was said that this report, together with mention of Caleb's will, had been reprinted in an Australian paper, and it was believed that somebody in that country who read it decided to investigate; ironical indeed, if true, that a report of the saving of one penny changed the destination of a quarter of a million pounds. However that may be, and whether the rumours had substance or not, distant relatives decided to challenge the will even though the estate had been wound up, and in the long-drawn-out litigation which followed, the House of Lords, in 1944, held, as mentioned earlier, that the residuary bequest was void for uncertainty.

After the House of Lords' decision, the trustees were faced with the formidable task of collecting from some 140 institutions or objects which could in fact properly be described as both charitable and benevolent, the residue already distributed among them, in order that a re-distribution following the lines of intestacy could be made. Whilst this caused great consternation and difficulties for the various charities and organisations which had been included in the residuary distribution, the biggest headache locally was the fate of the old folk who had given up their homes to go and live in the new bungalows where, they had been told, they could stay for the rest of their lives.

By a fortunate coincidence the Society of Friends (Quakers) were at that time (towards the end of the Second World War) looking for permanent homes for their old people, who, on account of infirmity and bombing, had been cared for in temporary evacuation hostels, many of whom had no homes to return to when the hostels closed at the end of the war. The Diplock homes were offered to the society, and the society agreed to purchase them. At that time only 12 bungalows had been erected on the five-acre site. The Society of Friends generously allowed the old folk already installed in the bungalows to remain, and additional bungalows were erected. Thus the old folk already housed were not disturbed, and some of the cash required for repayment to the Diplock estate was forthcoming.

After many years away from the village, I returned there to live for a period before eventually returning to New Zealand in 1961. The population had by that time increased to four or five thousand, and the country village image was no longer evident. Southdown Hall was no more. The grounds had been cut into building sections and the Hall itself demolished. A large petrol station (Bowser) stood just outside where the main gates had been—there was, however, just one thing still remaining—the fine old stag statue. It had been removed from the grounds and re-erected just inside the entrance to the grounds of the bungalow homes, and engraved upon a plaque beneath the stag was the following inscription:

> "These Cottage Homes were erected in 1937 under a trust contained in the Will of Caleb Diplock of Polegate who died 23rd March 1936. On 21st June 1944 it was decided by the House of Lords affirming the decision of the Court of Appeal, that this trust was void for uncertainty in the wording. In September 1945 the property was purchased by the Society of Friends (Quakers) with the aid of contributions including a substantial grant from the Bernhard Baron Trust in recognition of which the dwellings are hereby renamed:
>
> "THE BERNHARD BARON COTTAGE HOMES."

My last view of Caleb's estates at Polegate as the train sped past the old boundaries on the first leg of my journey back to New Zealand was of half-built houses and pegged-out sections, and clearly visible through the trees were the rooftops of the Bernhard Baron Cottage Homes; and somewhere in those grounds stood the stag statue, all that remained of what was once Southdown Hall and a permanent reminder for any who might still recall "Hospital Sunday".

D. E. ATTWOOD(*a*)

(*a*) Mrs Attwood is Secretary to the Canterbury District Law Society.

On bidets—"Usually placed beside the lavatory, it is a receptacle that allows one to wash those parts of the human body that, in a sitting position, are exposed to the bidet." A Circumlocution Award of the Month to the *Otago Daily Times*.

I MARRIED A METER-MAID

What a title. It has all the shocking impact of, say, *I Married a Monster From Outer Space!*

Why? Who classified meter-maids as direct descendants of Medusa? Surely this much maligned species is about due for a plea of tolerance, and as one who has spent many hours driving around and around city blocks observing the daily habits and flight paths of meter-maids I feel as qualified as anyone else in claiming some knowledge of their trials and tribulations.

Watching them swinging from parking meter to parking meter one must feel some kind of sympathy for their grim raison d'etre.

Always on the prowl, forever fending off their natural enemies with every-ready ball-point pens and ticket books, is there no love in their lives? No food? Recreation? Compassion? (I have never seen one smile. Smirk, yes. Never smile. I don't take that as any reflection on their personalities so much as a characteristic bred into them over millions of years of evolution, in much the same way that grill-room waitresses have evolved with hot-soup-resistant thumbs.)

Yet I *have* seen one of them pause while writing out a parking ticket and—using her own reflection in the side window of the very vehicle she was about to penalise—casually adjust a stray wisp of her hair with a deft flick of a well-manicured, unemployed left claw. A remarkably *human* gesture I thought.

But am I the only one to have ever felt this about their kind? Watching other motorists parked at the kerbside with motors running for an alibi as a meter-maid approaches weaving in and out of a line of cars writing death sentences on the road with a piece of chalk mounted on the tip of a short brutal wooden lance, I have often been struck by the expressions on the waiting motorists' faces. Knife-eyed they are living proof that capital punishment will never be completely erased from the minds of even our most progressive citizens.

And yet even here the effects of civilisation upon animal man are shown to be for the best. After all, when did we last hear of some meter-maid's brutally mutilated body discovered hanging from a parking meter with the clock reading. "Expired"? (If there'd been meter-maids in Jack the Ripper's day you can bet he'd never have soiled his knife with harmless street-walkers.)

Still we must be thankful they're not nocturnal creatures. (No doubt this is nature's way of protecting them from their enemies.) Operating only by day, at least their degrading task is lit up for all decent citizens to take note and evasive action of.

But catch them in a covey. A fascinating spectacle if you can observe them unobserved. Excitedly comparing uniforms, ball-point pens, ticket book butts, they come across as so keen to do *well*.

But most enthralling of all is watching them actually stalking their malingering prey. Cruising through a street of innocently parked vehicles, their eyelids at half-mast, pupils dilated and with an expression of poised indifference. Suddenly their hawk-eyes catch sight of an ignominious red flag on a parking meter! Of course there are various reactions here, depending on the psyche, disposition, and anti-vehicular attitude of each particular maid.

Some stop, frown, then lurch forward at many times the speed of sound, clawing at ball-point pen, ticket book, meter, and car all at the same time, the smell of blood forcing their eye-teeth out and below their bottom lip.

Others will blanch, stagger slightly, re-balance themselves on the nearest parking meter. If its clock shows it has ample time left they will quickly let go as if it's contagious—then slowly and ominously move towards their four-wheeled victim with their tail erect.

Then, of course, there is the utterly perverted kind who, upon sighting that vile red flag hoisted near a defenceless car will torment the immovable vehicle by circling it and prodding it with their chalked lance like a picador maltreating a non-violent bull. Sizing it up, noting the model—whether it's a good year for rolling around the tongue later on when she discusses the day's kill with her hench-women—assessing what the owner's worth and how this is going to hurt him financially much more than it's going to hurt her, and all the time click, click, clicking the catch up and down on her retractable ball-point pen. This I must confess, even for someone as keen to plead their case as I am, is a sight that the authorities *should* categorise as R21.

But is it really fair to judge their behaviour against those of civilised man's? Don't *all* of God's creatures have their place in the scheme of things? We might condemn their mode of dress, their dour demeanour, their way of life; yet we must in all honesty admit that their demise would have disastrous consequences for the chalk industry, the ball-point pen and paper manufacturers, and of course the courageous fashion designers perennially struggling to render their presence aesthetically tolerable to the motoring public at large.

Yes, they do have a right to their place under the sun. Still, I must be honest here. If put to the test and asked the question I would have to answer as any decent person must.

"No, I would *not* like my son to marry one."

JOSEPH MUSAPHIA

CORRESPONDENCE

Sir,

Legal Aid and the CIA

I have received notification from the Canterbury District Law Society recently of the International Workshop on Legal Aid to be held in New York in July of this year. Frankly the political overtones inherent in the programme horrified me—the United States Information Service, State Department and the Ford Foundation comprise an incongruous if downright sinister trio to support a Workshop on Legal Services to the poor. All it needs now presumably is the participation of the CIA to ensure that maximum advantage is taken of all facets of the workshop programme.

One could take objection at once to the final selection of New Zealand candidates by the United States Information Service. Undoubtedly the criteria to be applied will go far beyond the competence of the candidate. An ideal occasion for the CIA to apply their particular criteria no doubt. I see that *The Times* of London recently alleged that American Central Intelligence Agency agents had infiltrated British trade unions. To quote verbatim from the Christchurch *Press* 26.1.74: "The newspaper alleged that the CIA had deployed up to 40 extra agents in Britain recently because of the fears about Arab guerillas and the British industrial crisis."

Assuming not too unfancifully that the CIA give the go ahead and the United States Information Service select a candidate the vetting is still not at an end as the letter notes that all nominations are subject to Washington approval. In other words of all the candidates who might aspire to attend such a workshop it is not beyond the bounds of possibility that the best qualified would be the first to be rejected. Of course the International Legal Centre in New York may genuinely desire to add to the present knowledge of legal aid in different countries in Asia—the problem is that the political implications of selection by the United States Information Service in New Zealand and the equivalent agencies in other countries planned to participate, and final approval by "Washington" will detract considerably from the benefits of a workshop which requires a high degree of objectivity detachment and belief in social justice in order to succeed.

I object strongly to participation of the New Zealand Law Society in a function whose blatant political overtones have no place in the furtherance of legal knowledge. That the CIA could extend its influence in Asian countries through covert participation in legal aid programmes is a thought at once ironic and the New Zealand Law Society could take a leaf from the efforts of Mr Kirk on the political front to assert the independence of this country after years of foreign domination and advise the United States Information Service that it is competent to select a candidate for a Legal Aid Workshop without the necessity for final approval from Washington. At the very least the Society should seek some clarification of the criteria to be employed by the Information Service and Washington in the selection of participants.

Yours sincerely,

K J OSBORN,
Christchurch.

REGULATIONS

Regulations gazetted 31 January 1974 are as follows:

Agricultural Workers (Market Gardens) Order 1974 (SR 1974/11)

Mental Health (Fees and Forms) Regulations 1969, Amendment No 1 (SR 1974/12)

New Zealand-Australia Free Trade Agreement Order 1974 (SR 1974/13)

Rent Appeal Act Commencement Order 1974 (SR 1974/14)

Stabilisation of Prices Regulations 1973, Amendment No 3 (SR 1974/15)

Clean Air Act 1972—The Clean Air Act 1972 came into force on 1 April 1973. The Act requires that everyone take the best practicable means to minimise their contribution to air pollution. Many of the provisions have particular relevance to trade and industrial processes, and to transportation. The Department of Health is preparing publicity material to assist the public, industry and local authorities to interpret the requirements of the new legislation. A pamphlet, which is freely available from the local Department of Health office, or from the local authority, is the first of a series of publicity material.